Court of Appeals, State of Michigan

ORDER

Charles Anthony LeFevers v State Farm Mutual Automobile Ins Co

Docket No. 298216

LC No. 08-116325-NF

Peter D. O'Connell
Presiding Judge

Christopher M. Murray

Pat M. Donofrio
Judges

The Court orders that the motion for reconsideration is DENIED.

Contrary to the argument of defendant State Farm Mutual Automobile Insurance Company, this case is distinguishable from our Supreme Court's recent decision in *Frazier v Allstate Ins Co*, 490 Mich 381; ___ NW2d ___ (2011). In that case, the plaintiff slipped and fell on a patch of ice as she was closing the passenger door of her vehicle. The door itself played no role in causing plaintiff's injury. The Court determined that the passenger door did not constitute "equipment" mounted on the vehicle and that, as such, the plaintiff's injury was not "a direct result of physical contact with equipment permanently mounted on the vehicle," as required under MCL 500.3106(1)(b). Rather than constituting "equipment," the Court opined that the passenger door was a constituent part of the vehicle itself. *Id.*

The instant case involves the tailgate on a dump trailer, rather than a passenger door, and plaintiff was injured while he was attempting to unload DDT contaminated dirt from the dump trailer using the tailgate. MCL 500.3106(1)(b) states that accidental bodily injury arises out of the operation or use of a parked vehicle as a motor vehicle if "the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process." This is the exact scenario presented in this case.[1] Plaintiff was attempting to use the tailgate in the process of unloading dirt from the vehicle. Rather than an integral component of the vehicle itself, the tailgate was necessary for the dump truck to serve its load-carrying purpose and operated in conjunction with the hydraulic lift to contain and control the flow of matter being unloaded from the vehicle. Unlike the passenger door in *Frazier*, the tailgate was not a constituent part of the vehicle itself and was utilized only when the dump truck was functioning as a dump truck, i.e., transporting or hauling material for unloading at a dump site. Unlike a passenger door, we note that a tailgate is not a necessary component

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[1] In our opinion, we determined that plaintiff failed to establish a genuine issue of material fact regarding whether his injury occurred "as a direct result of physical contact with . . . property being lifted onto or lowered from the vehicle in the loading or unloading process." MCL 500.3106(1)(b). Thus, we concluded that that aspect of MCL 500.3106(1)(b) was inapplicable. Nevertheless, this statutory language is helpful here because it shows that the Legislature considered the loading or unloading process to constitute an exception to the exclusion of coverage for parked vehicles in certain circumstances. The facts of this case, where plaintiff was injured while using equipment permanently mounted on the vehicle to unload the dump truck, is in keeping with the statutory language.

of a vehicle that is not being used for load-carrying purposes. Because MCL 500.3106(1)(b) specifically contemplates the scenario presented in this case, *Frazier* is distinguishable. Therefore, defendant's motion for reconsideration is denied.

MURRAY, J. (*concurring*): I concur in the denial of defendant's motion for reconsideration. Both our opinion in this case, as well as the Court of Appeals opinion in *Frazier v Allstate Insurance Co*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket Nos. 292149 & 293904), relied upon *Miller v Auto Owners*, 411 Mich 633; 309 NW2d 544 (1981), and *Gunsell v Ryan*, 236 Mich App 204; 599 NW2d 767 (1999), in analyzing whether a tailgate to a dump truck fell within MCL 500.3106(1)(b). In its recent decision reversing the Court of Appeals decision in *Frazier*, the Supreme Court did not discuss, modify or otherwise disturb these rulings. *Frazier v Allstate Ins Co*, 490 Mich 381; ___ NW2d ___ (2011). Consequently, the *Gunsell* Court's holding that the rear door to a small semitrailer came within MCL 500.3106(1)(b) is still binding precedent. MCR 7.215(J)(1). And though dicta, the *Miller* Court's statement that "a parked delivery truck may cause injury in the course of raising or lowering of its lift," and therefore presumably the lift would come within MCL 500.3106(1)(b), *Miller*, 411 Mich at 640, the statement still must be considered by our Court as the Supreme Court's only statement on the issue under the most closely analogous situation.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JAN 31 2012
Date

Chief Clerk